

**PG. MAHLI BIN PG. NOORDIN v.
DATO HAJI ABD. RAHMAN**

[O.C.J. (Roberts C.J.) February 6 & 11, 1987]

[Bandar Seri Begawan – Originating Motion No. 2
of 1987]

Civil Procedure – Documents – Inspection – Whether documents are public documents – Whether there is a right to inspect all the documents – Specific Relief Act (Cap. 109), s. 44(1) – Evidence Act (Cap. 108), ss. 74-76.

The applicant was involved in a collision near Bandar Seri Begawan between a motor car driven by himself and another car. The applicant suffered severe injuries from which he has never recovered sufficiently to manage his own affairs. He has no memory of the accident.

The solicitors acting for the applicant, in the absence of any effective instructions from their client, applied to officers of the Royal Brunei Police Force for the release of the various documents which are listed in the motion, in order to assess the liability, if any, of the other car driver and to advise their client appropriately.

Correspondence on the subject continued for some months with a final refusal on October 20, 1986 by the Public Prosecutor (who was advising the respondent) to release any of the documents.

In the present originating motion, the applicant sought an order under section 44(1) of the Specific Relief Act that the respondent shall release or produce to the applicant the following documents or copies thereof relating to the traffic accident:

- (a) the rough sketch plan of the scene of the accident as drawn by the investigating officer;
- (b) the fair copy of the aforesaid rough sketch plan together with the key containing all relevant measurements;
- (c) the first information report;
- (d) all the reports of the Land Transport Vehicle Inspector;
- (e) all witnesses' statements.

Held, dismissing the application: (1) all the documents are public documents;

(2) however, except for the first information report, the applicant has no right to inspect the rest of the documents.

Cases referred to:

- (1) *Husdi v. Public Prosecutor* [1979] 2 M.L.J. 304.
- (2) *Khoo Siew Bee v. Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49.
- (3) *Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1980] 2 M.L.J. 196.
- (4) *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 M.L.J. 24.
- (5) *Loo Fang Siang v. Ketua Polis Daerah, Butterworth* [1981] 2 M.L.J. 272.

- A (6) *State of Madras v. G. Krishnan* A.I.R. 1961 Mad. 92.
- (7) *Syed Abu Bakar v. Public Prosecutor* [1982] 2 M.L.J. 186.
- (8) *R. v. Bryant and Dickson* (1946) 31 Cr. App. R. 146.

B ORIGINATING MOTION.

Andrew Ong for the applicant.

Ivan Leong (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

C **Roberts C.J.:** This originating motion is brought under section 44(1) of the Specific Relief Act (Cap. 109) by Norjuita binte Emran, as next friend of the applicant.

D The applicant, on April 15, 1984, was involved in a collision near Bandar Seri Begawan between a motor car BC 3201 drive by himself and another car, BE 4926, believed to have been driven by Mokkim bin Zainal.

E Pengiran Mahli suffered severe injuries, from which he has never recovered sufficiently to manage his own affairs. He has no memory of the accident.

F The firm of advocates and solicitors acting for the applicant, in the absence of any effective instructions from their client, applied to officers of Royal Brunei Police Force for the release of the various documents which are listed in the motion, in order to assess the liability, if any, of Mokkim and to advise their client appropriately.

G Correspondence on the subject continued for some months, with a final refusal on October 20, 1986 by the Public Prosecutor, who was advising the respondent, to release any of the documents.

H The originating motion seeks an order that the respondent shall release or produce to the applicant the following documents, or copies thereof, relating to the traffic accident between BC 3201 and BE 4926 on April 15, 1984.

- I (a) the rough sketch plan of the scene of the traffic accident drawn by the investigating officer;
- (b) the fair copy of the aforesaid rough sketch plan together with the key containing all relevant measurements;

- (c) the first information report;
- (d) all the reports of the Land Transport Vehicle Inspector;
- (e) all witnesses' statements.

At the outset of the hearing, counsel for the respondent announced that he would not contest the application for the first information report, but that he maintained his opposition to the production of any of the other documents sought by the applicant.

Sections 74 to 76 of the Evidence Act

I have been referred to a number of Malaysian cases, in which applications have been made for the release to applicants of statements of different kinds taken during the course of police investigations.

Although the application is made under section 44 of the Specific Relief Act, the applicant cannot obtain an order under that section unless he can show that the public officer, against whom such an order is sought, is (among other things) under a duty to perform the act which it is sought to compel him to do by such an order.

To establish such a duty, the applicant must show that each of the documents concerned is a public document and that he has a right to inspect it.

The relevant provisions are to be found in sections 74 to 76 of the Evidence Act (Cap. 108) which are, save for minor differences of little or no significance, in the same terms as sections 74 to 76 of the Malaysian Evidence Act:

"74. The following documents are public documents —

- (a) documents forming the acts or records of the acts —
 - (i) of the sovereign authority;
 - (ii) of official bodies and tribunals; and
 - (iii) of public officers, legislative, judicial and executive, whether of Brunei or of any other part of the Commonwealth or of a foreign country;
- (b) public records kept in Brunei of private documents.

75. All other documents are private.

76. Every public officer having the custody of public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate,

A written at the foot of such copy, that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies."

B *What is a public document?*

Syed Othman F.J. in *Husdi v. Public Prosecutor*⁽¹⁾ when dealing with an application for copies of statements made to the police by witnesses in the course of an investigation commented at p. 306:

C

"On the face of it, a police statement falls under section 74 of the Evidence Act, as it is a document forming the act of a public officer."

D In *Khoo Siew Bee v. Ketua Polis, Kuala Lumpur*,⁽²⁾ Suffian L.P. (sitting as a judge of the High Court) observed at p. 50H:

"I would prefer to follow *State of Madras v. G. Krishnan* (A.I.R. 1961 Mad. 92) which held that a confession made by an accused during the course of a police investigation to a magistrate is a public document because it formed the act or record of the act of a judicial officer who was under a duty to record the statement. Here too, the police who recorded the cautioned statements of the accused was under a duty to record them and therefore they were public documents."

E

F In *Haji Abdul Ghani bin Ishak v. Public Prosecutor*⁽³⁾ Wan Yahya J. observed:

"There is no doubt that the documents were recorded by a public officer, who was under a duty to record them and therefore they would, to my mind, fall under the definition of a public document."

G In *Anthony Gomez v. Ketua Polis Daerah Kuantan*,⁽⁴⁾ it was conceded by the respondent that a first information report is a public document, so that this question was not examined by the Federal Court.

H In *Loo Fang Siang v. Ketua Polis Daerah, Butterworth*,⁽⁵⁾ Arulanandon J., when dealing with an application for the production of a first accident report for use in civil proceedings, observed, quoting from Jowitt's *Dictionary of English Law*:

I "A public document is defined as 'a document made for the purpose of the public making use of it'. And that is exactly what police reports are under section 107 of the C.P.C."

I must differ from the definition of public document contained in the latter case. I do not

think that the proper test is whether a document is made for public use; most documents made by public servants are made because the public servant is under a duty to make them. Whether or not the public has a right to use them later is a matter to be dealt with if it arises.

I would adopt the test set out by Suffian L.P. in *Khoo Siew Bee* — the document, if it is recorded, by a public officer who was under a duty to record it.

On the basis of this definition, all the documents which are listed in the application are public documents.

Right to inspect

This is, however, only the first condition which an applicant must satisfy before he can avail himself of section 44 of the Specific Relief Act.

He must next demonstrate that he has a "right to inspect" the document, within the meaning of section 76 of Cap. 108.

The Malaysian cases on this aspect of the problem are not easy to reconcile, but I will note them in chronological order.

In *Gomez*,⁽⁴⁾ Suffian L.P. said:

"Although our section 76 is silent as to the right of the applicant to inspect the first information report in question, it is clear that, under the common law, he has that right, as he is a person interested in it and inspection is necessary for the protection of his interest."

In *Khoo Siew Bee*,⁽²⁾ Suffian L.P. quotes with approval the following passage from *State of Madras v. G. Krishnan*:⁽⁶⁾

"Section 76 in terms entitles a person who has a right to inspect a public document to a certified copy thereof. The section does not, however, specify the persons who would be entitled to inspect a public document. But judicial decisions have long ago settled that question. It has been held that the right to inspect a public document is correlated to the interest which the person who seeks inspection has in the document. That interest should be a direct and tangible one in the document."

He then ruled that an accused person had such an interest in a cautioned statement recorded from him, and that he had a right to a certified copy of it before trial.

In *Abdul Ghani*,⁽³⁾ the judge decided that an accused person had the same interest in an un-

A cautioned statement made by himself to a police officer as he had in the case of a cautioned statement made by him and that he was entitled to certified copies of both.

In *Husdi*,⁽¹⁾ application was made for copies of a cautioned statement made by the accused to the police and of the statements recorded by the police from witnesses during their investigation. The judge commented:

"I am of the view that the common law right of an accused to inspect the first information arises from the duty of the police to inform the accused of the reason for his arrest."

He followed *Khoo Siew Bee* in relation to the cautioned statement.

However, he refused to extend the effect of that case so as to confer on the accused a right to inspect the statements made by witnesses to the police, rejecting the argument that an accused person was entitled to any document in the hands of the police if it was shown that he had an interest in it and that inspection was necessary for the protection of his interest.

The judge appears to have decided that such statements should not be made available because:

- (a) he could find no provision in the Criminal Procedure Code or the Evidence Act which could be construed so as to give a right to an accused person to inspect the statement of a witness recorded by a police officer;
- (b) he thought it undesirable as a matter of public policy for the prosecution to supply the defence with police statements.

In *Loo*,⁽⁵⁾ the judge expressed the opinion that "an interest is not qualified or limited to matters where he is involved in criminal prosecution. He has just as much interest in police reports made by third parties which may be defamatory, false or imputing negligence on the highway..." And a person who seeks to establish negligence on the part of someone who collided with him has "a legitimate interest in knowing what the other person's version of the accident as given in the police report is."

I note that the police had made available to the applicant sketch plans, key and photographs, so that the court made no ruling on these documents.

In *Abdul Ghani*,⁽³⁾ the judge regarded the element of interest as the main question, commenting that:

"such an element was considered to be sufficient in the respect of a first information report. That element of interest was extended in *Khoo Siew Bee*'s case to cautioned statements and, in my considered opinion, to uncautioned statements as well."

In *Syed Abu Bakar v. Public Prosecutor*,⁽⁷⁾ Seah J. rejected an application from an accused to inspect and make copies of all documents in the possession of the prosecutor in connection with the trial of the accused.

In *Gomez*, Suffian L.P. seems to adopt, without qualification, the view that, at common law, a person has a right to inspect a first information report because "he is a person interested in it and his inspection is necessary for the protection of his interest".

Yet in *Khoo*, Suffian L.P., when ruling that an accused should be entitled to a copy of his own cautioned statement, commented that his ruling did *not* apply to statements made by others who were potential witnesses against or for him, it being well established by *R. v. Bryant and Dickson*⁽⁸⁾ that the prosecution is under no duty to supply these to the defence.

Khoo must therefore be seen to modify the wide terms of *Gomez*, making it clear that, although an accused has a very powerful interest in the contents of such statements, he is not entitled to inspect them.

Change in character

Statements to a police officer are usually recorded by him in the course of an investigation, following a first information report, in order to decide whether or not criminal proceedings should follow.

If, as the Malaysian cases suggest, an accused has no right to inspect such statements (other than the first information report and the accused's own statements, cautioned or uncautioned), can it be said that the character of statements changes, so that, although not open to inspection for criminal proceedings, they will be, if they are required for possible civil proceedings.

In *Husdi*, Syed Othman F.J. commented:

A "I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect."

The judge was dealing with an application to inspect statements (recorded by a police officer) for the purpose of defamation proceedings. In *Loo*, the judge was dealing with an application to inspect a final information report for use in civil proceedings. He rejected the submission that a first information report, although open to inspection by an accused for the purposes of his defence, would not also be available to an applicant who would be affected by it in relation to civil proceedings.

Both judges therefore appear to be in agreement that statements recorded by police officers are either available under section 76 for inspection by anyone who has a legitimate interest, whether for use in criminal or civil proceedings, or by nobody.

Conclusion

E From the various cases cited above, and others referred to in them, the effect of sections 74 and 76 seems to me to be as follows:

- (a) any statement recorded by a police officer for the purposes of an investigation under the Criminal Procedure Code or under any other law giving power of investigation to a police officer is a public document;
- (b) the Evidence Act does not state who has a "right to inspect" under section 76 of that Act;
- (c) the only statements which have been held to confer a "right to inspect" are first information reports and cautioned and uncautioned statements;
- (d) all three are available to an accused person, if applicable to his case;
- (e) the first information report is also available to a person who can show that he has a direct and tangible interest in it — e.g. for possible civil proceedings;
- (f) while the disclosure of the above documents is necessary in the interests of justice to enable an accused to defend himself more effectively,

I cannot see any principle on which other statements taken by the police should be open to inspection under section 76, save that, any person, whether an accused or not, and whether or not he can show that he requires it for any particular purpose, is entitled to "inspect" a copy of a statement made by himself.

I should make it clear that my opinion is restricted to the application of sections 74 to 76 of the Evidence Act to statements recorded by police officers. I express no view as to:

- (a) other public documents;
- (b) any right which a person may have at common law, or under rules of civil procedure to inspection of documents;
- (c) the extent of state privilege in relation to public documents.

I regret that I am unable to detect any reasonable principle on which I could rule that there is a right to inspect the rough and fair sketch plans and the motor vehicle examiner's reports (and photographs, though these were not sought). These are prepared by neutral witnesses and would be of considerable assistance to those who have to advise the clients on whether or not civil proceedings should be instituted.

However, the Public Prosecutor has assured me that, although he wishes to preserve the position that there is no right in law to inspect public documents of this nature, the police will in future be prepared to consider applications relating to those documents sympathetically, if made by or on behalf of someone with a legitimate interest in possible civil proceedings which might arise from the matters investigated.

The application must therefore fail, save in regard to the first information report, as to which there remains no dispute.

Order accordingly.

Solicitors: *Choo Chan & Wong.*

A MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. BADRULSHAM BIN BAHAROM

[O.Cr.J. (Lim Beng Choon J.) January 28, 1987]

[Alor Setar — Criminal Trial No. 31 of 1984]

Criminal Law — Dangerous drugs — Possession of 409.3 gms cannabis — Whether accused had knowledge of possession — Meaning of "possession".

C *Evidence — Cautioned statement — Whether made voluntarily and admissible — Dangerous Drugs Act 1952, s. 37A(1)(b).*

Criminal Procedure — Sentencing policy — Possession of cannabis — Deterrent factor and in public interest.

D On November 22, 1982, the accused was ambushed by a party of police officers. He was found to be in possession of a bag which contained 409.3 grammes of cannabis. He was accordingly charged under section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) ("the Act") for trafficking in 409.3 grammes of cannabis, an offence punishable under section 39B(2) of the Act.

E On November 26, 1982, a cautioned statement was taken from the accused and it was recorded by an inspector. When the prosecution tried to tender the cautioned statement, the learned defence counsel objected against the tendering of that statement as a prosecution exhibit on the ground that it was not made voluntarily by the accused.

F **Held:** (1) the cautioned statement was inadmissible on the ground that no proper caution was administered by the recording officer before he recorded the purported cautioned statement from the accused. The omission of the words "to answer any question" rendered the caution defective in law;

G (2) to establish possession by an accused person of any dangerous drugs or to impute him possession of the said drugs, it must first be shown that he had knowledge of the drugs which were found to be in his possession;

H (3) in considering whether an accused person has sufficiently rebutted the presumption of possession of the dangerous drugs which were found to be in his actual physical custody or under his control, it is legitimate for the court to scrutinize the evidence as to what the accused said contemporaneously with the act or omission and also the surrounding circumstances under which the accused acted or failed to act;

I (4) in the circumstances, the accused failed to rebut the presumption under section 37(d) of the Dangerous Drugs Act 1952 and as the amount of cannabis in his possession exceeded the limit prescribed in section 37(da) of the Act, the presumption under section 37(da) is also applicable against him and he likewise failed to rebut that presumption;

(5) after taking into consideration the facts that the cannabis involved was comparatively small and that cannabis is a less deleterious drug than opium, morphine